

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT PETITION)	
OF ROBERT RYDER DBA RADIO PAGING)	CASE NO. QWE-T-04-32
SERVICE AND JOSEPH B. McNEAL DBA)	
PAGEDATA FOR ARBITRATION OF AN)	
INTERCONNECTION AGREEMENT)	ORDER NO. 29905
DISPUTE.)	
)	

On November 26, 2004, Radio Paging Service and PageData (collectively referred to as “the Pagers”) filed a Petition for Arbitration against Qwest Corporation. In their Petition, the Pagers requested that the Commission arbitrate the disputed issue of whether they are entitled to a refund for “transit traffic” charges paid to Qwest under their respective Interconnection Agreements. Transit traffic consists of calls that originate from a carrier other than the interconnecting local exchange carrier (in this case Qwest) but nonetheless are carried over Qwest’s network to the paging carrier’s network. Order No. 29140 at 23 *citing TSR Order*¹ at n.70 (emphasis added); *Robert Ryder v. Idaho PUC*, ___ Idaho ___, 120 P.3d 736 (2005). On November 30, 2004, the Commission issued a Summons to Qwest directing it to file an Answer to the Pagers’ Petition.

In December 2004, the Commission granted Qwest’s Motion requesting an extension of time in which to file its Answer. Order No. 29672 allowed Qwest to file its Answer no later than January 4, 2005. The parties subsequently consented to another extension for Qwest to file its Answer of an unspecified duration. On June 9, 2005, the Commission issued Order No. 29798 directing Qwest to file an Answer no later than June 23, 2005. Qwest filed a timely Answer. For reasons set out in greater detail below, the Commission declines to resolve this Interconnection Agreement dispute.

THE PETITION FOR ARBITRATION

The two Interconnection Agreements subject to this dispute were both submitted to the Commission as voluntarily negotiated Agreements. Case Nos. USW-T-99-5 and 99-13. Radio Paging’s initial Interconnection Agreement with U S WEST Communications (Qwest’s

¹ *TSR Wireless v. U S WEST Communications, Memorandum Opinion and Order*, 15 FCC Rcd 11,166 (2000), *aff’d sub nom. Qwest Corporation v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

predecessor)² was approved by the Commission on May 13, 1999. *See* Order No. 28032. PageData's initial Interconnection Agreement with Qwest was approved by the Commission on September 10, 1999.³ *See* Order No. 28139.

In their Petition, the Pagers allege that they entered into their respective Interconnection Agreements "under duress or business compulsion." Petition at 2, ¶ 3. The Pagers contend that when they entered into their Agreements in 1999, federal telecommunications laws and Federal Communications Commission (FCC) regulations provided that certain facilities were to be furnished to them without charge. They insisted that Qwest refused to supply the necessary facilities unless the Pagers entered into their Agreements. Although Radio Paging's Interconnection Agreement recognized the parties' disagreement over transit traffic, Section 2.1.1.2 of their Agreement states that the Pager will be charged for transit traffic. Agmt. at 1-2.

The Pagers also contend that they are not time barred by the terms of their expired Agreements from seeking arbitration. They rely on a related Idaho federal court action where the Pagers brought suit against Qwest. In the federal suit, the Pagers maintained that Qwest agreed to dismissal of the federal action, without prejudice "and stipulated to entry of a dismissal order wherein the parties waived limitations defenses." Petition at 3, ¶ 5. Thus, the Pagers insist that they are "entitled to arbitration of the issue of . . . transit traffic charges under their interconnection agreements." *Id.* at ¶ 6.

THE INTERCONNECTION AGREEMENTS

In compliance with the federal Telecommunications Act of 1996, voluntarily negotiated interconnection agreements are submitted to the state regulatory commissions for approval. 47 U.S.C. § 252(a), (e). Both Agreements purported to be voluntarily negotiated and were filed as "Joint Applications" submitted by both the Pagers and Qwest. Case Nos. USW-T-99-5 and 99-13. Several provisions of the two Interconnection Agreements are pertinent to this dispute. Section 1.2 of both Agreements state that each Agreement is based

² Unless otherwise necessary, all references will be to Qwest.

³ Both Pagers are currently operating under new Interconnection Agreements. PageData's adoption of the Arch-Qwest Interconnection Agreement was approved by the Commission in Order No. 29198 issued February 28, 2003. Radio Paging's new Interconnection Agreement was approved in Order No. 29407 issued January 5, 2004.

in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the "Existing Rules"). To the extent that certain of the Existing Rules are changed and modified, and it reasonably appears that the Parties would have negotiated and agreed to different term(s) . . . than as contained herein had such change or modification been in existence before execution hereof, then this Agreement shall be amended to reflect such different term(s), condition(s), or covenant(s). Where the Parties failed to agree upon such an amendment, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.

Interconnection Agreements, § 1.2 (emphasis added).

Both Interconnection Agreements also contain nearly identical dispute resolution provisions. The dispute resolution or arbitration clause is contained in Sections 8.15 and 17.16 of Radio Paging and PageData's Agreements, respectively. The only difference between the two provisions is the time limitation for seeking arbitration in the second paragraph. Radio Paging's arbitration provision provides

If any claim, controversy or dispute between the Parties, . . . ("Dispute") cannot be settled through negotiation, it shall be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. The prevailing Party, as determined by the arbitrator shall be entitled to an award of reasonable attorneys' fees and costs. The arbitration shall occur in Denver, Colorado. Nothing in this Section shall be construed to waive or limit either Parties' right to seek relief from the [Idaho] Commission or the Federal Communications Commission as provided by state or federal law.

No dispute, regardless of the form of action, arising out of this Agreement, may be brought by either Party more than three (3) years after the cause of action accrues.

Radio Paging Agreement, § 8.15 (emphasis added). PageData's Agreement limits filing for arbitration to no more than two years after the cause of action occurs. § 17.16. The Agreements were signed by Mr. Ryder and Mr. McNeal, respectively.

QWEST'S ANSWER AND MOTION TO DISMISS

On June 23, 2005, Qwest filed its Answer and Motion to Dismiss the Petition. Qwest urges the Commission to dismiss the dispute on the merits. In the alternative, if the Commission is not inclined to reach the merits of the dispute, then the Commission should dismiss the Petition consistent with the Commission's Order Nos. 29687 and 29726 in Case No. QWE-T-03-25 (the "03-25 case").⁴ In the 03-25 case the Commission declined to exert jurisdiction over an interconnection dispute because of the very same arbitration clause set out above.

Turning to the merits, Qwest raises a number of contract arguments and affirmative defenses why the Commission should dismiss the Petition on the merits. Qwest argues the Petition for Arbitration is "six years too late." Qwest Answer at 3. The Pagers "could have properly invoked the Commission's [Section 252(b) Arbitration] jurisdiction in 1999, but they chose otherwise, seeking the Commission's approval of the very negotiated agreements they now ask the Commission to undo." *Id.* Qwest insists that the Pagers should not be allowed to seek retroactive amendment of their "now-terminated" Interconnection Agreements. *Id.* The arbitration provision of both Agreements prohibits the parties from seeking arbitration two or three years after the alleged cause of action occurs. Qwest also notes that the Pagers voluntarily entered into their respective Interconnection Agreements and these Agreements require them to compensate Qwest for the transit traffic delivered to them." *Id.* at 7.

In the alternative, Qwest asserts the "Commission should decline to exercise its jurisdiction and should hold that PageData follow the contract's dispute resolution process." Qwest Answer at 9. Qwest contends that the FCC has recognized that a state commission has no responsibility to arbitrate an interconnection dispute if the underlying interconnection agreement contains a dispute resolution provision. Qwest relies on the *Star Power Order* where the FCC acknowledged that parties to an interconnection agreement

may be bound by dispute resolution clauses in their interconnection agreement to seek relief in a particular fashion and, therefore, the state commission would have no responsibility under Section 252 to interpret and enforce an existing agreement.

In the Matter of Star Power Communications, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to 252(e)(5) of the Telecommunications Act of

⁴ PageData has appealed from the Commission's two Orders in the 03-25 case. Supreme Court Docket No. 31844.

1996, *Memorandum Opinion and Order*, 15 FCC Rcd 11,277 n.14 (June 14, 2000); 2000 WL 767701 (FCC).

Qwest urges the Commission to decline jurisdiction and allow this matter to proceed to arbitration. Qwest observed that the Commission declined jurisdiction in the 03-25 case, and the same result is warranted here.

DISCUSSION AND FINDINGS

After reviewing the pleadings in this case, we decline to exercise jurisdiction over this Petition for Arbitration. This case is similar to PageData's complaint against Qwest in the 03-25 case. In that case, PageData brought a complaint against Qwest under its Interconnection Agreement – the same Interconnection Agreement that is the subject of this case. As noted above, both Interconnection Agreements in this proceeding contain an arbitration provision for the resolution of disputes between the parties. The arbitration provision provides that any dispute between the parties “shall be resolved by arbitration” and the arbitrator’s decision “shall be final and binding.” (Emphasis added.) Consistent with our Orders in the 03-25 case, we believe that the parties must resolve their dispute through arbitration. Order No. 29687 at 6; Order No. 29726 at 4-6. Thus, we again decline to exercise jurisdiction over this transit traffic dispute.

In the 03-25 case, PageData argued that the arbitration clause was unconscionable. In the present case, the Pagers assert that they were compelled to enter into their respective Interconnection Agreements “under duress or business compulsion.” Petition at 2. They also maintain that the federal court dismissal does not limit their right to seek redress under the Interconnection Agreements.

In its Answer, Qwest counters that the Pagers entered into their Interconnection Agreements through “voluntary negotiations without resort to mediation or arbitration.” Answer at 2. Our records show that both Mr. Ryder and Mr. McNeal executed their respective Interconnection Agreements. Each Joint Application requesting the Commission’s approval of the two Interconnection Agreements was purportedly submitted by both the Pagers and Qwest. Qwest further asserts that the Pagers could have availed themselves of mandatory arbitration by invoking the Commission’s jurisdiction under Section 252(b) of the Telecommunications Act. Finally, Qwest raises the issue of whether the Commission should resolve this dispute where the

Interconnection Agreements have been superceded or where the cause of action has accrued more than two or three years before the petition was filed.

The parties have raised a broad array of contract issues including but not limited to duress, business necessity, waiver, various forms of estoppel, the effect of the federal court stipulation, parol-evidence, set offs, contract construction, and enforcement. We believe that resolution of the contract issues presented in this case lie beyond the jurisdiction of the Commission. As we noted in the 03-25 case, our Supreme Court has held that “the construction and enforcement of contracts is generally ‘a matter which lies in the jurisdiction of the courts and not the public utilities commission.’” Order No. 29726 at 4 *quoting Lemhi Telephone Company v. Mountain States Tel. & Tel. Company*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977); *Afton Energy v. Idaho Power Company*, 111 Idaho 925, 729 P.2d 400 (1986). Consequently, we decline to resolve this dispute given the presence of the arbitration clause and because resolution would require us to construe and determine complex contract issues. Our determination here is consistent with our Orders in the 03-25 case.

As noted above, Order Nos. 29687 and 29726 are the subject of PageData’s appeal in Docket No. 31844. The Court’s decision in the appeal may be controlling in this case. Procedural Rule 324 allows the Commission to stay any Order on its own motion. IDAPA 31.01.01.324. Given the similarity of this case and the 03-25 case on appeal, the Commission finds there is good cause to stay the effective date of this final Order until the Supreme Court renders a decision, or until the case is dismissed.

ORDER


IT IS HEREBY ORDERED that the Commission declines to accept jurisdiction to arbitrate Radio Paging and PageData’s dispute with Qwest regarding transit traffic under their respective Interconnection Agreements. Consequently, we dismiss the Pagers’ Petition without prejudice.

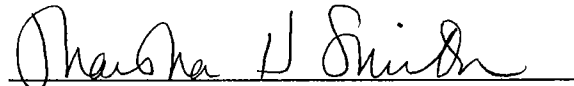
IT IS FURTHER ORDERED that this final Order be STAYED pending the Supreme Court’s decision in Docket No. 31844. This final Order shall become effective after the Court issues a final decision and remittitur in the appeal, or when the appeal is dismissed.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) may petition for reconsideration within twenty-one (21) days after this final Order becomes effective as described in the preceding ordering paragraph. Within seven

(7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

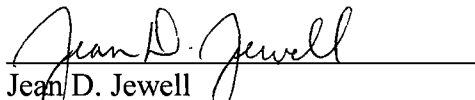
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 8th day of November 2005.


PAUL KJELLANDER, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


DENNIS S. HANSEN, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

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